**BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA**

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**IN THE MATTER OF APPLICATION FOR)
BENEFICIAL WATER USE PERMIT NO.) FINAL ORDER
41H-11548700 BY PC DEVELOPMENT)**

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The Proposal for Decision (Proposal) in this matter was entered on June 10, 2003. Applicant PC Development filed timely exceptions to the Proposal on June 30 and requested an oral argument. Responses to Applicant's exceptions were filed by Objectors Sypes Canyon Objector Group and Charles E. and Amelia E. Kelly. An oral argument was held in Helena on August 13, 2003, with arguments made by John Bloomquist on behalf of Applicant, and Holly Franz on behalf of Objector Sypes Canyon Objector Group. Objectors Charles E. and Amelia E. Kelly declined to participate in the oral argument, but their response brief has been considered in the preparation of this Order.

The Proposal is to deny this application because the Applicant failed to prove by a preponderance of evidence that water is legally available and no adverse effect would occur to prior appropriators. The Applicant raises a procedural exception to the hearings process. Applicant also asserts the adequacy of Applicant's aquifer testing, methodology, and analysis and presented some additional legal arguments that the Hearings Officer was failing to follow previous hearings orders in his interpretation of the law.

Admissibility of Evidence - Exhibit OG9

Applicant objects to Conclusion of Law #4 and the admission into evidence of Exhibit OG9. Applicant objects that although the statutory rules of evidence do not apply to these proceedings, the Hearing Examiner was in error in allowing into evidence Exhibit OG9 because 1) the exhibit was never produced in response to discovery which was continuing in nature; 2) the exhibit was an analysis of calculations and modeling done by the author himself, and was not incorporated by witness Gallagher in any analysis she herself conducted; 3) the analysis was received by the Objectors (two days) in advance of the hearing and could have been presented to Applicant in advance of hearing; and 4) the author, Bredehoeft, was not made available for cross-examination.

Conclusion of Law #4 recounts that Applicant objected to the admittance of this five-page memorandum because it was not disclosed prior to the hearing and the author of the exhibit was not present for cross-examination.

Conclusion of Law #4 states the reason the exhibit could not be produced earlier is that the exhibit is a review of the prefiled testimony of Applicant's hydrogeologist and Objector saw no opportunity in the hearing procedure specified at the pre-hearing conference for the introduction of evidence of this type, and in addition, the first opportunity for the exhibit author to make the review was two nights before the hearing. Conclusion of Law #4 further states that in response to the objection by Applicant's counsel the Objectors pointed out that hearsay is allowed in this contested case hearing, and the exhibit is hearsay. The Hearing Examiner concluded Applicant did rebut the conclusions in Exhibit OG9, that Applicant was not prejudiced by the late disclosure of Exhibit OG9, and that Exhibit OG9 was admitted into the record.

Although the rules of evidence do not apply to these proceedings except by stipulation of the parties, Mont. Code Ann. § 85-2-121, and there was no such stipulation, all parties are still entitled to a fair hearing. Therefore, Applicant's objection to the exhibit in this case will be reviewed to see that a fair hearing was granted and that other applicable statutes have been complied with. In this case Applicant has shown that discovery for such expert testimony or memoranda was served and it is not disputed that the memoranda in question was not produced pursuant to the discovery request that was continuing in nature. From the record it appears that the prefiled testimony was filed on February 18, 2003, and that the hearing date was on March 18, 2003. The Objectors therefore had all that time to turn over any type of expert memorandum that would be introduced at the hearing. *One of the purposes of the DNRC discovery rules is to prevent surprise at the hearing, and allow all parties the opportunity to fully prepare for hearing.* That the Objector's expert witness could only review the prefiled testimony two days prior to hearing is a matter of timing up to the Objectors to control. Even if the memorandum was prepared two days before hearing, it should have been immediately presented to opposing counsel if there was any possibility it would be offered into evidence, and arrangements should have been made to have the author present for cross-examination. The Montana Administrative Procedures Act, Mont. Code Ann. § 2-4-612(3), mandates that:

> 5) A party shall have the right to conduct cross-examinations required for a full and true disclosure of facts, including the right to cross-examine the author of any document prepared by or on behalf of or for the use of the agency and offered in evidence. (Emphasis added)

Also, DNRC's Hearing Rules provide the right to cross-examination. A.R.M. 36.12.218 ("All parties have the right to… cross-examination."); A.R.M. 36.12.221(Adverse witnesses…may be cross-examined….); A.R.M. 36.12.223(1)(a)(i)("All parties may present evidence and argument with respect to the issues and cross-examine witnesses.").

> If one party has some sort of expert witness evidence that they intend to use at hearing, it simply must be turned over to the other side before hearing. If the memorandum was only for the use of Objector's counsel for preparing for hearing, that is another matter entirely, but any expert testimony or memoranda to be offered at hearing must be disclosed as early as possible. Counsel can then weigh their options such as making a motion to exclude the evidence, or a motion to postpone the hearing until the expert can be deposed. These complicated water cases often turn on expert testimony, and so expert memoranda are not some sort of ordinary hearsay that might otherwise be allowed because the rules of evidence do not apply.[1] The case of Perdue v. Gagnon Farms, Inc., 314 Mont. 303, 65 P.3d 570 (2003), is instructive in this matter. (Discovery is for making "all relevant facts available to parties in advance of trial and to reduce the possibilities of surprise and unfair advantage." (emphasis added).

Rules of civil procedure pertaining to discovery and sanctions still apply in this case even if the formal rules of evidence do not. See DNRC Hearing Rules at A.R.M 36.12.215(3).

In the present case it was an error to allow Exhibit OG9 into evidence over the objection of Applicant's counsel, especially when such expert evidence had been sought in discovery where the obligation to supplement discovery was continuing, and where the author of the document was not present for cross-examination. As the foregoing case demonstrates, expert testimony and documents must be disclosed to the other party in advance of hearing. The continuing obligation to supplement discovery requests was or should have been direction enough to Objector's counsel to turn over the memorandum as soon as it was in hand, and Applicant's counsel should not have been presented with the memorandum for the first time at hearing. *In DNRC proceedings, all parties must understand that surprise is not allowed and that if in doubt their obligation is to always disclose witnesses or evidence before hearing, especially expert witnesses or evidence. Parties in DNRC proceedings must*

[1] The hearsay memorandum here not disclosed prior to hearing from an expert witness not available for cross-examination is not "the type of [hearsay]

understand that discovery rules will be enforced and that witnesses or evidence not properly disclosed can be precluded from use at hearing.

Not admitting Exhibit OG9 begs the question of whether a reversal of the Proposal for Decision is required. A review of the record demonstrates that unlike in Perdue where the expert had information exclusively in his possession that was critical, such is not the case here. Applicant had as much access to the information needed to prove the statutory criteria as Objectors did. Additionally, Applicant could have moved for a continuance of the hearing in order to depose the expert had it been felt the exhibit was critical in this case. Even without the introduction of Exhibit OG9, Objectors had other evidence from other witnesses properly admitted that went towards showing the statutory criteria were not met in this case, and Applicant had the opportunity to present a full prima facie case that the statutory criteria were met. Additionally, the Hearing Examiner also had the benefit of the DNRC Staff Expert who questioned the conclusions drawn by Applicant's expert, and who was available for cross-examination, and who was cross-examined. The DNRC is entitled to utilize its Staff Expert and specialized knowledge in deciding these cases. Mont. Code Ann. § 2-4-612(7). The Hearings Examiner accorded Exhibit OG9 limited weight, accepting the exhibit as Hearsay, and taking into account the unavailability of the Exhibit to the Applicant and the unavailability of the author for cross-examination. Even the Hearing Examiner stated it was not prejudicial. Here, a review of the record without the use of Exhibit OG9 still demonstrates Applicant did not meet the burden of proof for the issuance of a permit. Thus, a reversal of the Proposal for Decision is not required.

Conclusion of Law #4 is reversed as to the admission of Exhibit OG9. The Proposal is amended on the third line at the top of page three, to insert "not" between "was" and "admitted," and Conclusion of Law #4 is modified to read as follows:

"4. Objector Gallagher offered Exhibit OG9 at hearing. Exhibit OG9 was not disclosed prior to hearing through discovery as required, was offered at hearing, and Applicant did not have an opportunity to cross-examine the author. For the reasons stated in this Final Order, Exhibit OG9 is not admitted into evidence in this matter. Legal availability is the comparison between the water physically available at the point of diversion and the existing demands in the source of supply throughout the area of potential impact. Mont. Code Ann. §§ 85-2-311 (1) (a) (ii) (A), (B), (C). Applicant has not determined the existing demand for the potential area of impact.

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evidence commonly relied upon by reasonably prudent persons in the conduct of their affairs." A.R.M. 36.12.221.

Objectors and well owners in the area have been affected in recent years, but whether decreased water levels and flows are the result of the current drought or development is uncertain. Legal water availability is determined by analysis of non-drought periods. *See In the Matter of Application 41B-074154 by Johnson,* Proposal for Decision, (1990). Applicant has shown in non-drought years water is physically available, but has not determined the existing legal demand within the projected cone of depression. Therefore, Applicant has not proven water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, and in the amount requested, based on an **analysis** of the evidence on physical water availability and the existing legal demands on the supply of water. Thus, the Applicant has not shown the criteria met by a preponderance of evidence. *See In the Matter of Application 76LJ-062935 by Crop Hail Management,* Proposal for Decision, (1990). Montana Code Ann. § 85-2-311 (1) (ii). See Finding of Fact No. 6."

Adequacy of Applicant's Testing, Methodology and Analysis to Meet its Burden of Proof

Applicant presented substantial evidence describing the aquifer and the results of aquifer pumping tests. The Proposal describes the aquifer system in Finding of Fact 4 as:

> "in a complex sequence of alluvial fan deposits. The aquifer system under the Autumn Ridge Subdivision property and surrounding areas is contained in a mixture of Quarternary and Tertiary-aged deposits. The deposits consist of alluvial sand and gravel lenses discontinuously and complexly interbedded with lenses of alluvial silt and clay as well as fine-grained silt and clay deposits of both wind blown and waterborne origin that separate the sand and gravel lenses."

In drilling wells to identify the water bearing sand and gravel lenses, three distinct water bearing zones were identified, referred to as the shallow, intermediate, and deep zones. Applicant intends to pump and use water from the deep zone, whereas all the prior appropriators pump from the shallow and intermediate zones.

Applicant performed aquifer pump-drawdown tests on three test wells that were also intended to be the production wells for the subdivision. The tests also included monitoring wells in the intermediate and shallow zones. The tests were for at least 72 hours on two of the wells and 24 hours on the third well, at rates exceeding the requested flow rates, and proved by a

preponderance of the evidence that the wells could meet the physical water availability criteria. See Proposal Finding of Fact No. 4.

The tests also showed only minor drawdown of the static water level of the monitoring well in the intermediate zone of the aquifer and no drawdown of in the shallow zone monitoring well. Based on these tests the cone of depression for the wells was projected for twenty years into the future, and Applicant argued that the cone would not substantially extend beyond Applicant's property boundary. Given these facts, Applicant argued that the legal water availability criteria would be met.

The record shows, however, that the Objectors and the Department Expert questioned this methodology for identifying the potential area of impact. The latter argued that there is some vertical connection and leakage between the three aquifer zones, and that the 72-hour pump/drawdown tests were inadequate to assess whether leakage from the upper zones would not be increased over time by pumping from the deep zone in this relatively low productivity aquifer. The Department Expert noted that even though the drawdown in the intermediate zone after 72 hours of pumping was only two feet, Applicant did not monitor the full recovery of the static water level in that monitoring well. Objectors argued that additional analysis of the impacts of pumping the deep zone on the upper zones, and the inducement of leakage between those zones, was needed to prove legal water availability and no adverse effect. Further, a twenty-year projection of impacts may be a sufficient time horizon for some uses, but for a subdivision providing household uses, a much longer timeframe for projecting impacts is necessary, such as one hundred years.

In Conclusion of Law #4, the Hearings Examiner concluded that because Applicant's analysis did not compare the applicant's evidence of physical water availability with the existing demands in the source of supply throughout the area of potential impact, Applicant did not satisfy their burden of proof of legal water availability.

In excepting to this conclusion, Applicant argues that the legal demand was estimated. An estimate of the volume of water consumed by prior water users was compared with an estimate of total volume of water available, or moving through, the deep zone of the aquifer on a yearly basis. The Hearing Examiner noted correctly that the total amount of water consumed is not the total amount of water to which prior right-holders have a legal right, that their total water rights also include the amount of water diverted.

Applicant also argues there is no reason to do the comparison if the cone of depression does not extend to, or only very modestly impacts drawdown, in any other water user's well. The statute literally requires Applicant to include a comparison of physical availability with legal demands. The Hearings Examiner correctly concluded that Applicant's comparison of physical

water availability with projected consumptive use did not meet this requirement. See Proposal Finding of Fact 6.

Applicant correctly argues that the Department has previously accepted its aquifer-testing methodology in other instances and situations, just as it has ruled that an appropriator of groundwater is not allowed to "command the source" of supply simply by being the first to appropriate water from an aquifer system. *In the Matter if Application No. 008323-76L by Starkel; In the Matter of Application No. 78511-g41QJ by Big Stone Colony; In the Matter of Application No. 82374-s76L by Distefano.* Each situation is different, however, and this one is somewhat more complicated than these precedents.

The record reflects that this is not a situation in which there is a large aquifer from which there are only a few shallow appropriations. There are already significant demands upon this limited source. What may be adequate to prove by a preponderance of evidence of legal water availability and no adverse effect in large, lightly tapped aquifer situations is not binding precedent in all circumstances. These cases are each decided on their unique facts. The Montana Supreme Court has ruled that "It is a well-established principle of agency law that an agency has a duty to either follow its own precedent or provide a reasoned analysis explaining its departure." Waste Management Partners of Bozeman Ltd. v. Montana Dept. of Public Service Regulation, 284 Mont. 245, 944 P.2d 210 (1997). In this case, as in that case, different factual circumstances can result in a different decision.

The record shows this is a complex aquifer system from which there are already a considerable number of appropriators who are experiencing problems with their wells and utilizing their legal water rights. Because of the problems with wells in this area, a temporary controlled groundwater area pursuant to Mont. Code Ann. § 85-2-506 and -507 has been created and a study of the aquifer system is underway. See *Final Order in the Matter of the Petition for Establishment of the Sypes Canyon Controlled Groundwater Area No. 41H-115474,* as attached to the Proposal. This situation calls for more than just the standard amount of information that may be required for use of an aquifer that is known to be more productive and for which limited uses are being made. The record shows that the Department Expert called upon applicant to provide more information, and indeed, it was noted in the Proposal for Decision on the establishment of the Sypes Canyon Controlled Groundwater area that:

> "…community wells will be subject to a difficult burden of proof establishing water availability and lack of adverse effect. Montana Code Ann. § 85-2-311. The information any proposed community well must submit to meet the criteria for issuance of a permit is just the sort of

information that the DNRC must have for designating a permanent controlled ground water area and appropriate controls." Conclusion of Law #8, *Proposal for Decision in the Matter of the Petition for Establishment of the Sypes Canyon Controlled Ground water Area, No. 41H-115474.*

Despite these warnings, Applicant chose to go to hearing with the amount of information they had and that had been sufficient in certain other cases. But this was simply inadequate in this case where water problems had already been well documented. Applicant relied upon assumptions about aquifer characteristics, the vertical connections between the three aquifer zones, and long-term impacts upon the upper zones caused by depletions in the deep zone, that are seriously questioned by the Department's Expert and the Objectors. Nor was the legal demand of other appropriators appropriately considered in comparison to physical water availability. Perhaps legal water availability and no adverse affect could be proven, such as may be possible through modern hydrogeologic computer modeling, but it would take more convincing evidence than was presented in this case.

The Supreme Court has clearly recognized "the Water Use Act was designed to protect senior water rights holders from encroachment by junior appropriators adversely affecting those senior rights." Montana Power Co. v. Carey, 211 Mont. 91, 685 P.2d 336 (1984). Therefore, where applicants cannot prove the statutory criteria of the Water Use Act by a preponderance of the evidence, the legislative imperative to maintain the status quo for senior water right holders from encroachment will be furthered.

THEREFORE, the Department of Natural Resources and Conservation hereby accepts and adopts the Proposal for Decision's Findings of Fact and Conclusions of Law in this matter, with the modifications noted below, and incorporates them by reference.

Based on the record in this matter, the Department makes the following:

ORDER

Beneficial Water Use Permit Application 41H-11548700 is hereby **DENIED** to PC Development with the following modifications to the Proposal:

1. On the third line at the top of page three, insert "not" between "was" and "admitted."

2. Conclusion of Law #4 is amended to read:

"4. Objector Gallagher offered Exhibit OG9 at hearing. Exhibit OG9 was not disclosed prior to hearing through discovery as required, was offered at

hearing, and Applicant did not have an opportunity to cross-examine the author. For the reasons stated in this Final Order, Exhibit OG9 is not admitted into evidence in this matter. Legal availability is the comparison between the water physically available at the point of diversion and the existing demands in the source of supply throughout the area of potential impact. Mont. Code Ann. §§ 85-2-311 (1) (a) (ii) (A), (B), (C). Applicant has not determined the existing demand for the potential area of impact. Objectors and well owners in the area have been affected in recent years, but whether decreased water levels and flows are the result of the current drought or development is uncertain. Legal water availability is determined by analysis of non-drought periods. *See In the Matter of Application 41B-074154 by Johnson,* Proposal for Decision, (1990). Applicant has shown in non-drought years water is physically available, but has not determined the existing legal demand within the projected cone of depression. Therefore, Applicant has not proven water can reasonably be considered legally available during the period in which the applicant seeks to appropriate, and in the amount requested, based on an **analysis** of the evidence on physical water availability and the existing legal demands on the supply of water. Thus, the Applicant has not shown the criteria met by a preponderance of evidence. *See In the Matter of Application 76LJ-062935 by Crop Hail Management,* Proposal for Decision, (1990). Montana Code Ann. § 85-2-311 (1) (ii). See Finding of Fact No. 6."

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition in the appropriate court within 30 days after service of this Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape or the oral proceedings to the district court.

Dated this _____ day of October, 2003.

_____
Curt Martin, Chief
Water Rights Bureau
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record at their address or addresses this _____ day of October, 2003:

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